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UNITED STATES v. POPE
(9th Cir. 2012) 686 F.3d 1078

SEARCH INCIDENT TO ARREST

OK TO SEARCH ON PROBABLE CAUSE TO ARREST;
NEED NOT SAY "YOU ARE UNDER ARREST"

PROBLEM

You are talking to a man who appears under the influence of marijuana. You ask him if he has marijuana on his person and he says yes. Can you arrest him? Can you search him?

FACTS

On August 16, Forest Law Enforcement Officer Ken Marcus drove to a large gathering of people in the El Dorado National Forest after receiving reports of loud music and the use of a public address system. While there, he was approached by the defendant in this case, Travis Pope. Officer Marcus immediately formed the belief that Pope was under the influence of marijuana. Officer Marcus asked Pope if he had been smoking marijuana, and Pope admitted that he had. Officer Marcus then asked Pope if he had any marijuana on him, but Pope denied this.

Officer Marcus then ordered Pope to empty his pockets. Pope's hands were close to his pockets, but he made no move to empty them. Officer Marcus again asked Pope if he had any marijuana on his person, and this time Pope admitted that he did. Hearing that, Officer Marcus directed Pope to place the marijuana on the hood of Officer Marcus' patrol car. Pope did so. Officer Marcus then cited Pope for possession of marijuana and allowed him to leave.

Pope was charged in federal district court with possession of marijuana in violation of 21 United States Code section 844(a). He made a motion to suppress the marijuana he had removed from his pocket. He claimed that Officer Marcus ordering him to empty his pockets was a violation of his right to be free of unreasonable searches under the Fourth Amendment.

The federal district court magistrate, after hearing the above evidence, denied the suppression motion. The magistrate ruled that the initial order to Pope to empty his pockets was not a search – because Pope did not empty his pockets. The magistrate then ruled that Officer Marcus' second order to Pope to empty his pockets was a valid search incident to an arrest because at that time, after Pope had admitted he was in possession of marijuana, Officer Marcus had probable cause to arrest Pope and could search him incident to that arrest. Following the denial of his suppression motion, Pope pleaded guilty reserving his right to appeal. He then appealed.

RULING AND REASOINING

The United States Court of Appeals for the Ninth Circuit affirmed the ruling of the federal district court magistrate that the seizure of the marijuana was valid. (Opinion by Circuit Court Judge Bea with Circuit Court Judges Wallace and Callahan concurring.)

Regarding Officer Marcus's first command to defendant Pope to empty his pockets, the Circuit Court ruled that because Pope never emptied his pockets, the command was not a search. It said:

> *Pope did nothing to comply with Officer Marcus' initial command and thus nothing that was not already exposed to the public was revealed. Neither Officer Marcus nor his verbal command produced any invasion of privacy, whether based on societal expectations or physical trespass. Therefore, Officer Marcus' initial command, without compliance, did not effect a search under Forth Amendment.* 686 F.3d at p. 1081.

Regarding Officer Marcus' second command to Pope to empty is pockets and place the marijuana on the hood of the patrol car, the Circuit Court agreed with the federal district court magistrate that at that time Officer Marcus had probable cause to arrest Pope – because Pope had by then admitted being in possession of marijuana – and so the emptying of the pockets on the patrol car hood was simply a search incident to an arrest.

In response to Pope's argument that he had not been arrested prior to emptying his pockets, the Court of Appeal pointed to the United States Supreme Court case of **Cupp v. Murphy** (1973) 412 U.S. 291, 296 which held that once probable cause to arrest exists, an officer can conduct a search incident to an arrest even though he had not yet formally told the suspect he is under arrest. 686 F.3d at p. 1083. It continued:

> *When Pope admitted that he was in possession of marijuana, Officer Murphy obviously had probable cause to arrest him for possession of a controlled substance. . . . Therefore, Officer Marcus' warrantless search was justified under* ***Murphy****.* 686 F.3d at p. 1084.

Thus, the Circuit Court ruled that ordering Pope to place his marijuana on the patrol car hood – in effect, a search, was lawful. 686 F.3d at p. 1084.

APPLICATION TO POLICE WORK

The legal principle that an officer with probable cause to arrest can conduct a search incident to an arrest even though he has not told the suspect he is under arrest is not new and has been discussed in past issues of the Law Enforcement Legal Reporter (LELR).

The Ninth Circuit Court of Appeals case of **United States v. Smith** (9th Cir. 2005) 389 F.3d 944 also ruled that a search incident to an arrest is valid as soon as officers have probable cause to arrest and that officers need not first state to the suspect that he is under arrest. *"Accordingly, we now hold that as long as there is probable cause to make an arrest, and the search is conducted roughly contemporaneously with the arrest, the search-incident-to-arrest doctrine applies and no warrant is required."* 389 F.3d at p. 952. **Smith** is summarized in the August 2010 LELR.

The California Court of Appeal case of **In re Lennies H.** (2005) 126 Cal.App.4th 1232 ruled that evidence felt during a lawful pat search can be seized under the plain feel doctrine and/or on the grounds the "feel" of the evidence established probable cause to arrest the suspect. "*The fact that a defendant is not formally arrested until after the search does not invalidate the search if probable cause to arrest existed prior to the search and the search was substantially*

contemporaneous with the arrest." 126 Cal.App.4th at pp. 1239-1240. **Lennies H.** is summarized in the *July* 2005 LELR.

Please note also that Officer Marcus was not limited to simply having Pope place his marijuana on the patrol car hood. He also could have done a full search of Pope's person and clothing incident to his probable cause to arrest Pope. This may have been done in this case, but the appellate record does not show it.

A couple of more points of interest. What about the fact that simple possession of a small quantity of marijuana is a citable offense and that suspects are not normally placed under formal arrest for it. Does that change things?

The answer is no. The United States Supreme Court case of **Atwater v. City of Lago Vista** (2001) 149 L Ed 2d 549, 577 ruled: *"If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."* This includes actually taking the suspect into custody. And the United States Supreme Court case of **Virginia v. Moore** (2008) 170 L Ed 2d 559, 572 ruled: –"*When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety."* **Atwater** is summarized in the June 2001 LELR, and **Virginia v. Moore** is summarized in the July 2008 LELR.

So at the point where an officer has probable cause to arrest a suspect for possession of marijuana, the person is under arrest and may be searched incident to that arrest. If he is found in be in possession of only a citable quantity of marijuana, he can be cited and released at that point. But until he is cited and released he is under arrest – just as a traffic offender is under arrest until cited and released.

If an officer wanted to be technical, he could state to the suspect who admits possession of marijuana "you are under arrest for possession of marijuana." Then when only a citable amount if found, the officer could inform the suspect that he can choose to be taken into custody and booked or he can simply be cited out. Most will agree to be cited out.

And speaking of getting technical, suppose Pope, instead of admitting that he presently had marijuana on his person, had said to Officer Marcus, "You're too late. I finished smoking it up fifteen minutes ago." Could Officer Marcus then arrest and search Pope?

The answer is yes. The California Supreme Court case of **People v. Rios** (1956) 46 Cal.2d 297 held that it is lawful for officers to arrest a person who admits the past commission of a crime; that a confession alone is sufficient probable cause to make an arrest. In the **Rios** case the suspect admitted to an officer that he had recently injected heroin. The Court said: *"From defendant's admission that he had taken an injection of heroin two weeks before, it could be inferred that he had possessed heroin in violation of [then] Health and Safety Code, section 11550. . . . It is immaterial that defendant could not be convicted of possessing heroin without independent proof of the corpus delicti."* 46 Cal.2d at p. 298-299. So the arrest of the suspect was found to be valid as was the search incident to his arrest where heroin was found on his person. **Rios** is summarized in the August 2000 and May 2008 issues of the LELR.

So, according to the **Rios** case, if Pope had said to Officer Marcus that he had already smoked up his marijuana, Officer Marcus could have arrested Pope and searched him incident to that arrest – whether he formally arrested Pope or not. Now if nothing was found on Pope or only a

small quantity of marijuana, then this would not be a big deal. But if Pope decided to sue Officer Marcus in civil court for a civil rights violation – or if the search revealed evidence of a much more serious crime – such as a gun used to kill someone a day earlier – then it would be very important to know that the **Rios** case said the search was lawful.

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PEOPLE v. VALENCIA
(2012) 201 Cal.App.4th 922

VEHICLE STOPS AND SEARCHES

CONSENT TO FIRST OFFICER ALSO APPLIES TO SECOND OFFICER

PROBLEM

You arrive at the scene of a car stop made by other officers. One officer informs you that the driver had given consent to search the car but the officer found nothing within it. Figuring you have a better eye than the other officer, you'd like to take a look within the car. Can you?

FACTS

At about 5:15 p.m., Los Angeles Police Officer Ruben Banuelos and his partner, Officer Scott Costa, were on patrol in a marked police car when they saw a blue pickup truck with a broken tail light. They conducted a traffic stop. The truck was being driven by its owner, defendant Alejandro Valencia. Officer Banuelos asked Valencia, "Can I search your car?" and Valencia gave his consent to do so. Officer Banuelos performed a cursory search of the front compartment and cargo area of the truck but found nothing.

In the meantime, Officer Costa ran a warrant check on Valencia and was informed that Valencia might have outstanding warrants. Officer Banuelos then transported Valencia to the police station to investigate further. Rather than leave Valencia's truck on the side of the road, and because the officers planned to release the truck to Valencia if the possible warrants were determined not to be his, Officer Costa drove Valencia's truck to the police station.

At the police station, Officer Michael Hofmeyer, who had been in the area, met up with Officer Banuelos. Banuelos told Hofmeyer that Valencia had consented to a search of his truck. Banuloes said he conducted a search but found nothing. Officer Hofmeyer then decided to search the truck pursuant to the consent given earlier by Valencia to Banuelos. Officer Hofmeyer did so and found a bindle containing approximately three grams of cocaine in the cab of the truck.

Defendant Valenica was charged in Los Angeles Superior Court with possession of cocaine for sale. He moved to suppress the cocaine arguing that the consent to search the truck given by Valencia applied to Officer's Banuelos only and did not carry over to Officer Hofmeyer. After taking evidence by Officers Banuelos and Hofmeyer, the Superior Court judge ruled the search by Hofmeyer was valid. Following this, defendant Valencia pleaded guilty to one count of possession of cocaine. He was given a probationary sentence. He appealed the denial of his suppression motion.

RULING AND REASONING

The Court of Appeal affirmed the ruling of the Superior Court judge that the search of Valencia's truck by Officer Hofmeyer was valid. (Second District. Division Seven. Opinion by Justice Zelon with Presiding Justice Woods and Justice Jackson concurring).

The Court of Appeal framed the issues in this case as follows:

> *To determine whether Officer Hofmeyer's search exceeded the scope of Valencia's consent, we must decide two issues. First, we must determine whether, as a matter of law, it is ever reasonable to conduct more than one search pursuant to a single grant of consent. Second, to the extent the Fourth Amendment permits such conduct, we must decide whether Officer Hofmeyer's search was objectively reasonable under the circumstances presented in this case.* 201 Cal.App.4th at p. 928.

The Court of Appeal noted that there was no California case law addressing the issue of two searches pursuant to a single consent. But after reviewing cases from other jurisdictions, it found that such a second search could be valid. It said:

> *We conclude that, at least in some circumstances, a defendant's consent to a search may justify law enforcement in conducting more than one search. In determining whether a particular grant of consent permitted officers to conduct more than one search, courts must evaluate whether, under the totality of the circumstances, it was objectively reasonable for law enforcement to conclude that the subsequent search fell within the scope of the initial consent.* 201 Cal.App.4th at p. 932.

The Court of Appeal then set forth several factors to be considered in determining whether a second search pursuant to a single grant of consent would be valid, as follows:

> *Those factors have included (1) whether the defendant placed any limitations on the scope of the initial consent; (2) the amount of time that passed between the grant of consent and the contested search; (3) whether police remained in control of the area being searched prior to conducting the second search; (4) whether officers were searching a residence or other area that is entitled to a heightened expectation of privacy; (5) whether the suspect was arrested between the initial search and the subsequent search; (6) whether the searches were part of a continuous criminal investigation having a single objective; and (7) whether the defendant had advance knowledge of, and an opportunity to object to, a subsequent search.* 201 Cal.App.4th at p. 937.

After reviewing the facts of this case in relation to the factors set forth above, the Court of Appeal said: *"We conclude that, under these circumstances, Officer Hofmeyer's subsequent search of the vehicle did not exceed the scope of Valencia's consent."* 201 Cal.App.4th at p. 938. Two factors in particular that stood out to the Court of Appeal were that the search was of a vehicle rather than a residence and that the second search took place very shortly after the first search – within minutes.

The Court of Appeal specifically ruled that the actions of the officers in driving Valencia's truck to the police station where the second search was then conducted did not render the search unlawful. It said:

> *After obtaining a general grant of consent, officers conducted two searches of defendant's vehicle within a close timeframe, while maintaining continuous control over the area that was searched. We do not believe, under these circumstances, the officers' act of moving the truck to a new location rendered the second search unreasonable.* 201 Cal.App.4th at p. 940, fn. 5.

The Court of Appeal thus concluded:

> *Under the totality of the circumstances presented in this case, we hold it was objectively reasonable for Officer Hofmeyer to conclude that his search fell within the scope of Valencia's consent.* 201 Cal.App.4th at p. 940.

APPLICATION TO POLICE WORK

If the driver or person in control of a vehicle gives Officer One consent to search the vehicle, that consent would apply also to Officer Two providing the second consent search is reasonably contemporaneous with the first consent search, i.e., within a matter of minutes. If would also be preferable if the second search were conducted while the vehicle is in the same location as the first search, but this is not mandatory. Recall that in the **Valencia** case, the second search was conducted after the vehicle had been driven to the police station and not at the place where the first search had been conducted. Nevertheless, the second search was still ruled to be valid. But a big factor in that case was that the second search took place within minutes of the first search.

In seeking a consent search, it is best for the officer to ask for consent using wording that cannot be interpreted as limiting the consent to that officer only. So ask, *"Will you consent to a search of your vehicle?" "Can we search your vehicle?" "Would it be OK for us to search your vehicle?"*

Under what circumstances might officers want a second search by another officer when a vehicle has already been searched? Is this likely to happen often?

If the first officer who conducted the consent search was limited in his ability to conduct a thorough search because he was alone or had only one other officer with him who was watching one or more detained persons, in that situation arriving backup officers may wish to conduct a second search when they will be able to do so without being rushed or distracted. Or if the vehicle is moved from a busy street to a location where it can more easily searched then officers may wish to conduct a second search without the distraction of passing traffic. This might not happen often, but it can happen and, if so, a second search can be conducted by other officers pursuant to the original consent previously given to the officer who originally asked for it.

A couple of more words about asking for a consent search. A consent search must be conducted within the scope of the consent. If the suspect says to you, "You can do the search, but I don't want those other officers in my car," then the search can be conducted only by the officer to whom the consent was given. Or if the officer says only, "Do you mind if I take a quick look inside your car?", then a prolonged and thorough search would be deemed beyond the scope of the consent given. The case of **People v. Cantor** (2007) 149 Cal.App.4th 961 said that consent to a "real quick" search did not encompass opening containers within the car and that a methodical 15 minute search exceeded the "real quick" limitation. **People v. Cantor** is summarized in the June 2008 Law Enforcement Legal Reporter (LELR).

Finally, it is entirely lawful for officers to request a consent search at an otherwise lawful vehicle stop, and they need no special reason for asking for a consent search. See **People v. Gallardo** (2005) 130 Cal.App.4th 234 which so holds. **Gallardo** is summarized in the November 2005 LELR.

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PATEL v. CITY OF LOS ANGELES
(9TH Cir. 2012) 686 F.3d 1089

SEARCH AND SEIZURE

HOTEL MUST MAINTAIN A GUEST REGISTER AND
ALLOW OFFICERS TO EXAMINE IT

PROBLEM

You would like to determine if a suspect stayed at a local hotel on a certain night two weeks earlier. Can you simply go to the hotel and demand to examine their guest register? Is the hotel even required to keep a guest register?

FACTS

The answer to both questions, at least in the City of Los Angeles, is yes. In the case of **Patel v. City of Los Angeles**, motel owners Naranjibhai and Ramilaben Patel challenged in federal district court the constitutionality of Los Angeles City Municipal Code section 41.49 which requires all operators of hotels in the City to maintain certain guest registry information and to make it available to police officers on request. The district court judge found the code section to be constitutional and required the Patels to adhere to it. They appealed.

RULING AND REASONING

The United States Circuit Court of Appeals for the Ninth Circuit affirmed the district court's ruling. It agreed that the challenged municipal code section was constitutional. (Opinion by Circuit Court Judge Clifton with Circuit Judge Bea concurring. Circuit Judge Pregerson dissented.)

In their appeal, the Patels claimed that LAMC section 41.49 was unconstitutional under the Fourth Amendment because it was an invasion of privacy of hotel owners and their registered guests.

In arriving at its ruling, the Circuit Court first restated the requirements of LAMC 41.49. It defines "hotels" to include hotels, motels, inns, rooming houses and other establishments offering space for overnight accommodations for rent for a period of less than 30 days. It also requires that every operator of a hotel record certain information concerning its guests, including name and address, total number of guests, make, type and license number of the guest's vehicle if parked on hotel premises, scheduled date of departure, room number, rate charged and collected, method of payment, and the name of the hotel employee who checked the guest(s) in. The record may be kept in electronic, ink or typewritten form.

The ordinance also requires that the record be kept on the hotel premises in the guest reception area or in an adjacent office for at least 90 days after the last entry. It also requires that it be printable if maintained in an electronic form. Further, the record must be made available to any officers of the Los Angeles Police Department for inspection, and whenever possible the inspection shall be conducted in a manner than minimizes any interference with the operation of the business.

After considerable discussion of prior case law dealing with what is and what is not a reasonable expectation of privacy under the Fourth Amendment, the Circuit Court first noted that *"we have already held that hotel guests do not have a reasonable expectation of privacy in guest registry information once they have provided it to the hotel operator."* 686 F.3d at p. 1088.

Regarding any possible invasion of privacy of the hotel operators, the Circuit Court said:

> *The Patels have not established that all hotel owners have a reasonable expectation of privacy in their guest registers, or even that they themselves do. Nor have they demonstrated that the inspection of guest registers authorized by the ordinance is an unreasonable intrusion. As a result, we conclude that LAMC section 41.49 is not facially unconstitutional.* 686 F.3d at p. 1090.

So the ordinance is valid. Los Angeles Police Department officers can demand to see the guest register of any hotel or motel or similar establishment within Los Angeles City, and their request must be complied with, as set forth in the ordinance.

APPLICATION TO POLICE WORK

In the City of Los Angeles, the law is clear that LAMC section 41.49 requires the operators of any hotel or motel or similar establishment to maintain a guest register containing the relevant information about their guests as set forth above. LAPD officers can demand to see the register and the hotel operator must produce it on demand.

What about other cities – or county areas? The language quoted above makes it clear that *"hotel guests do not have a reasonable expectation of privacy in guest registry information once they have provided it to the hotel operator."* 686 F.3d at p. 1088. So if a hotel operator is willing to show the guest register to officers, he or she may do so whether there is a city or county ordinance requiring that he do so or not. But if there is no such ordinance, officers can only request and cannot demand that the guest register be produced. It could be accessed by means of a search warrant or subpoena, but otherwise the hotel operator need not show it to officers.

So the lesson is – if your city or county does not have an ordinance requiring hotel or motel operators to prepare and maintain a guest register and to show it to officers upon request, such an ordinance should be enacted. LAMC 41.49 would serve as a model for such an ordinance.

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PEOPLE v. SAUCEDA-CONTRERAS
(2012) 55 Cal.4th 203

MIRANDA/CONFESSONS

OFFICER MAY ASK SUSPECT CLARIFYING QUESTION AS TO WHETHER SUSPECT IS INVOKING HIS RIGHT TO COUNSEL

PROBLEM

You arrest a suspect for a serious crime. You give a Miranda admonition. The suspect says he understands his rights. You then ask the suspect if he is willing to talk to you now without a lawyer. The suspect responds with a rambling and confused statement that in part says he will speak to you without a lawyer but in another part seems to suggest that he wants a lawyer. So you honestly do not know if he is asking for a lawyer or not. Can you at that point ask the suspect directly whether or not he will speak to you without a lawyer being present? Or does the fact that he initially made a statement that might be interpreted as a request for a lawyer mean that all questioning must stop at that point? Would your answer be any different if the question involved an ambiguous invocation of the right to remain silent?

FACTS

Defendant Jose Sauceda-Contreras was arrested for murder. City of Anaheim Police Detective Robert Blazek was the primary investigator on the case. He wished to interrogate the defendant. The defendant spoke only Spanish, so detective Blazek had Anaheim Police Officer Lisa Trapp, who was fluent in English and Spanish, serve as translator during the interrogation, which was conducted in Spanish and later translated by Officer Trapp. The entire interrogation was videotaped.

The advisement of the Miranda rights and the defendant's responses – as translated into English – were as follows:

Officer Trapp*: You have the right to remain silent. Do you understand?*
Defendant*: A huh, yes.*

Officer Trapp*: Whatever you say can be used against you in a court of law. Do you understand?*
Defendant*: Yes.*

Officer Trapp*: You have the right to have a lawyer present before and during this interrogation. Do you understand?*
Defendant*: Yes, I understand.*

Officer Trapp*: If you would like a lawyer but cannot afford one, one can be appointed to you for free before the interrogation if you wish. Do you understand?*
Defendant*: Yes, I understand.*

Officer Trapp*: Having in mind these rights that I just read, the detective would like to know if he can speak with you right now?*

Defendant*: If you can bring me a lawyer, that way I, I with who . . . that way I can tell you everything that I know and everything that I need to tell you and someone to represent me.*

Officer Trapp*: Okay, perhaps you didn't understand your rights. Um . . . what the detective wants to know right now is if you're willing to speak to him right now without a lawyer present?*
Defendant*: Oh, Okay that's fine.*

Officer Trapp*: The decision is yours.*
Defendant*: Yes.*

Officer Trapp*: It's fine?*
Defendant*: A huh, it's fine.*

Officer Trapp*: Do you want to speak to him right now?*
Defendant*: Yes."* 55 Cal.4th at pp. 215-216.

Detective Blazek then interrogated the defendant who made many incriminating remarks regarding the murder for which he had been arrested. He was charged in Superior Court with murder.

In Superior Court, the defendant sought to suppress the statements made to Detective Blazek claiming that he had asserted his right to counsel during the admonishment and so should not have been questioned further – including those questions asked by Officer Trapp seeking to clarify if the defendant was invoking his right to counsel or not.

The Superior Court judge watched the videotape of the interrogation and read the translation of it. He ruled that the defendant had made a knowing waiver of his right to counsel and so admitted the incriminating remarks the defendant had made to Detective Blazek into evidence. The defendant was convicted of murder and sentenced to 25 years to life in state prison.

He appealed to the Court of Appeal which ruled, in a 2-1 decision, that the defendant's statement to Officer Trapp was an invocation of his right to counsel, and so his incriminating remarks should not have been introduced into evidence at his trial. It reversed his conviction. The prosecution then appealed to the California Supreme Court.

RULING AND REASONING

The California Supreme Court, in an unanimous decision by Justice Baxter, found that the defendant had validly waived his right to counsel and so reinstated his conviction.

The Supreme Court first stated that *"This court has recognized that when a suspect under interrogation makes an ambiguous statement that could be construed as an invocation of his or her Miranda rights, the interrogators may clarify the suspect's comprehension of, and desire to invoke or waive, the Miranda rights."* 55 Cal.4th at p. 206.

After considerable discussion, it then found that the defendant's statement to Officer Trapp, *"If you can bring me a lawyer, that way I, I with who . . . that way I can tell you everything that I know and everything that I need to tell you and someone to represent me"* – was sufficiently ambiguous to justify Officer Trapp *"seeking further clarification"* of whether or not the defendant was invoking his right to counsel. 55 Cal.4th at p. 207. It explained further: *"From an objective standpoint, a reasonable officer under the circumstances would not have*

understood the defendant's response to be a clear and unequivocal request for counsel. For that reason, the officers were justified in seeking to clarify defendant's intent." 55 Cal.4th at p. 219.

The Supreme Court – which viewed the videotape of the advisement and interrogation of the defendant – also rejected the defendant's assertion that his ultimate waiver of his Miranda rights to Officer Trapp was the product of intimidation or coercion. It noted that no coercive tactics were employed in order to obtain the defendant's wavier of his rights and that he did not appear to be under any undue pressure from the officers such as might have caused him to become unduly anxious or confused.

The Court explained further:

> *Once it was clarified for defendant that he was being asked if he was willing to speak with the officers "right now without a lawyer present," he immediately responded, "Oh, okay that's fine." Officer Trapp then told defendant, "The decision is yours," to which he replied, "Yes." She asked him, "It's fine?," to which he replied, "A huh, it's fine." The officer asked defendant yet again, "Do you want to speak to the detective right now?," to which he responded, "Yes."*
>
> *Under these circumstances, it is clear Officer Trapp was not "badgering" defendant into waiving his rights, but was instead seeking confirmation that he understood the decision to proceed with the interview without an attorney present was his alone, and that he in fact wished to do so. We find the record establishes by a preponderance of the evidence that defendant's wavier of his Miranda rights was freely and voluntarily given.* 55 Cal.4th at p. 220.

APPLICATION TO POLICE WORK

This case says very clearly that if a suspect – when being given a Miranda admonishment or during interrogation – makes a remark that might – or might not – be an invocation of the right to counsel <u>but could be construed as an invocation of the right to counsel</u> – the interrogating officer can ask questions seeking to clarify whether the suspect is or is not invoking his right to counsel. In this regard, please recall the quotation above: *"This court has recognized that when a suspect under interrogation makes an ambiguous statement <u>that could be construed as an invocation of his or her Miranda rights</u>, the interrogators may <u>clarify</u> the suspect's comprehension of, and desire to invoke or waive, the Miranda rights."* 55 Cal.4th at p. 206. If the suspect answers that he is waiving his right to counsel, then the interrogation can proceed.

Please note, however, the words of the United States Supreme Court in the case of **Berghuis v. Thompkins** (2010) 176 L Ed 1098 (summarized in the July 2012 Law Enforcement Legal Reporter (LELR)) which stated:

> *In the context of invoking the Miranda right to counsel . . . a suspect must do so unambiguously. If an accused makes a statement concerning the right to counsel that is ambiguous or equivocal or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants to invoke his or her Miranda rights.* 176 L Ed 2d at p. 1110.

So how does this square with the **People v. Sauceda-Contreras**? Here is how. If the suspect makes a statement that is ambiguous <u>but could be construed</u> as invoking the right to counsel,

then an officer can and should ask clarifying questions to establish whether the defendant is or is not invoking his right to counsel. This was the situation in the **Sauceda-Contreras** case. But if the defendant makes clearly ambiguous or equivocal remarks about invoking his right to counsel then these will not be considered an invocation of the right to counsel and the interrogating officers need not ask any questions clarifying whether the remarks were intended by the suspect to be invocation of the right to counsel.

The cases of **People v. Simons** (2007) 155 Cal.App.4th 948, 957 and **Clark v. Murphy** (9th Cir. 2003) 331 F.3d 1062, 1070-1072, set forth several instances of remarks that were held to be ambiguous and/or equivocal and thus not an invocation of the right to counsel, as follows: *"How long would it take for a lawyer to get here?" "I think I would like to talk to a lawyer." "Should I be telling you or should I talk to a lawyer?" "Maybe I should talk to a lawyer." "I might want to talk to a lawyer." "Do you [asking the interrogating officer] think I should talk to a lawyer?" "Do I need a lawyer?" "Should I call my lawyer?"* So remarks of this type are sufficiently ambiguous that they will not be deemed an invocation of the right to counsel and questioning may proceed without the necessity of questions clarifying whether the suspect intended them as an invocation of the right to counsel.

Simons is summarized in the February 2008 LELR; **Clark v. Murphy** in the April 2003 LELR.

Please recall also the case of **People v. Cunningham** (2001) 25 Cal.4th 926, 991, which held that a suspect's indication of his desire to have an attorney at some future time is not an invocation of his Miranda rights. In this case, the defendant said: *"I want to have an attorney present. I will talk to you now until I think I need one. I don't need one present at this time." "I'll talk to you until I think I need an attorney." "I'll talk to you now without an attorney present. I'll ask for one when I think I need one."* **Cunningham** is summarized in the September 2001 LELR.

Officer Lisa Trapp did a very fine job in the **Sauceda-Contreras** case – as evidenced by the fact that the California Supreme Court approved of her way of handling the advisement and wavier of Miranda rights in a unanimous opinion. But she had no way of knowing, back in 2007 when the interrogation of defendant Sauceda-Contreras took place, that in 2010 the U.S. Supreme Court would hold explicitly in the **Berghuis v. Thompkins** case, cited above, that it is not necessary to ask a suspect if he waives his rights and is willing to talk to an interrogating officer. Once a defendant states he understands his rights, officers can immediately begin asking questions and the suspect's answering of questions will be considered an implied waiver of his Miranda rights.

So, in view of that, the following Mirada advisement and waiver procedure is suggested.

A suggested Miranda admonishment and waiver is as follows:

"You have a right to remain silent. Do you understand?"

"Anything you say may be used against you in court. Do you understand?"

"You have the right to the presence of a lawyer before and during questioning. Do you understand?"

"If you want a lawyer but cannot afford to pay, a lawyer will be appointed for you free of charge before any questioning, if you wish. Do you understand?"

If the suspect answers "yes" to all of the "Do you understand questions," officers can then simply begin asking questions. Per **Berghuis v. Thompkins**, any answers to questions will be considered a waiver of the suspect's Miranda rights. If the suspect makes some ambiguous remark regarding his right to counsel, it may be ignored. If he makes a statement that, although ambiguous, might be construed as an invocation of the right to counsel, then clarifying questions can be asked to determine if the suspect is or is not invoking his right to counsel – as was done in the **Sauceda-Contreras** case.

Finally, the law regarding ambiguous assertions of Miranda rights is the same whether in reference to the right to remain silent or the right to counsel. As stated in the **Berghuis** case:

> *There is no principled reason to adopt different standards for determining when an accused has invoked the Miranda right to remain silent and the Miranda right to counsel. . . . Both protect the privilege against compulsory self-incrimination . . . by requiring an interrogation to cease when either right is invoked.* 176 L Ed 2d at p. 1110.

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PEOPLE v. LEAVEL
(2012) 203 Cal.App.4th 823

KIDNAPPING

OCCUPANT IS KIDNAP VICTIM WHEN MOVED WITHIN OWN HOME

QUESTION

Can a person be a victim of kidnapping when all the movement occurs within the confines of his or her own home?

FACTS

At 1:20 a.m., 69-year old Diann Panzera was in her home office when she heard noises and went into her kitchen to investigate. She saw a Black man, later identified as defendant Joseph Monroe Leavel, squatting in front of her refrigerator. He had entered through a window over the kitchen sink. He was wearing only pants; no shoes and no shirt.

Defendant Leavel, who is six feet tall and about 250 pounds, threatened Panzera and said, "Don't scream or I'll kill you." He slapped his hand over her mouth and knocked her to the ground, landing on top of her and causing her to lose bowel control. He then spent the next 50 minutes dragging Panzera through the various rooms of her house and taking various items of value, including a loaded handgun she kept in her nightstand drawer. He also stole a digital camera, Panzera's cell phone, and about $70 cash. He then forced her outside into her back yard with him where he retrieved his shoes and clothing. Panzera was frightened and "in shock" throughout the entire ordeal.

At one point during the movement throughout the house, Leavel called someone on Panzera's cell phone, identified himself as "Joe," and I said, "I've got $50. Never mind how I got it. I earned it." Defendant left at 2:20 a.m., taking the various items of value he had collected.

Leavel was eventually captured and was charged in Superior Court with residential robbery (PC 211); grand theft of a firearm (PC 487, subd. (d)(2); false imprisonment (PC 236); making criminal threats (PC 422); kidnapping to commit robbery (PC 209, subd.(b)(1); burglary (PC 459); and being a felon in possession of firearm (then PC 12021, subd. (a)(1). It was also alleged that Leavel had three prior convictions under the Three Strikes law which Leavel admitted prior to his trial. At trial, he was convicted of all charges and sentenced to a total of 102 years to life. He appealed.

RULING AND REASONING

The Court of Appeal affirmed all convictions and the sentence. (Fourth District. Division One. Opinion by Presiding Justice McConnell with Justices Benke and O"Rourke concurring.)

Among other issues raised on appeal was the sufficiency of the evidence of the kidnapping for robbery conviction. This is a very serious offense and by itself carries a sentence of life in prison. The Court of Appeal first set forth the relevant law regarding kidnapping for robbery, as follows:

> *Any person who kidnaps or carries away any individual to commit robbery is guilty of kidnapping for robbery. (Section 209, subd.(b)(1). Subdivision (b) of section 209 shall apply only if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended robbery.*
>
> *The rationale for this requirement is that, given the breadth of the statutory definition of kidnapping, it could literally overrun several other crimes, notably robbery and rape, since detention and sometimes confinement, against the will of the victim, frequently accompany these crimes. It is a common occurrence in robbery, for example, that the victim be confined briefly at gunpoint or bound and detained, or moved into and left in another room or place. Our Supreme Court concluded that such incidental movements are not of the scope intended by the Legislature in prescribing the asportation element of the same crime.* 203 Cal.App.4th at p. 833, internal cites and quotes omitted.

Recounting the facts of the case, the Court of Appeal ruled that the defendant's moving of the victim throughout her house, including forcing her into the kitchen to give him a beer and some food, and forcing her outside while he retrieved his clothing and then back into the house, were not "merely incidental" to the robbery. It said:

> *This is not a case of brief or slight movement naturally occurring in a robbery. The movement was excessive and gratuitous, in that it was intended to control and dominate Panzera. Although reasonable minds may differ, the evidence amply supports a finding that at least some of Leavel's forcible movement of Panzera was not "merely incidental" to the commission of the robbery.* 203 Cal.App.4th at p. 836.

Thus, the conviction of kidnapping for the purposes of robbery was affirmed.

APPLICATION TO POLICE WORK

The lesson of this case for police officers is to take a complete and detailed report of robbery and rape victims of all movements they were forced to make by the perpetrator. If the movements were beyond those "merely incidental" to the robbery or rape, then the crime of kidnapping to commit robbery or rape under PC 209 can be charged. All the movements of Diann Panzera were within her own home or, briefly, outside her home and then back in. But some of these movements had nothing to do with the actual robbery of the victim and thus were not "merely incidental" to it. So all movements of robbery and rape victims should be noted, even the seemingly inconsequential ones. It may be that those are the exact movements that will be considered not "merely incidental" to the robbery or rape and thus will support a 209 kidnapping for robbery or kidnapping for rape charge.

It is not uncommon for rape and robbery victims to be so traumatized by the crime that just happened to them that they are unable to give a complete and detailed account of crime. Thus, it is important for detectives assigned to the case to reinterview the victim after he or she has had a chance to recover from the initial trauma.

There are a couple of other notes of interest about this case. First, the prosecutor did a great job in charging every possible crime committed by the defendant, including false imprisonment and criminal threats. Those are often overlooked in robbery situations. So congratulations to

the prosecutor. Secondly, this crime happened July 22, 2005. But because the defendant had entered a plea of not guilty by reason of insanity and because there were issues as to his competence to stand trial, doctors had to be appointed to examine him. Thus, his trial did not take place until March 9, 2010.

In the meantime, the victim, Diann Panzera, died. Fortunately, the prosecutor was aware that Panzera was in poor health and so had taken the precaution of having Panzera testify at a videotaped "conditional examination" pursuant to PC 1335 et sec. This videotape was then shown to the jury at Leavel's trial. So congratulations to the prosecutor on this also. Please note that if it could be shown that Panzera's death was caused by the trauma of the defendant's attack upon her, he could be charged with murdering her as well.

Please recall also that Panzera kept a loaded handgun in her nightstand drawer. If she had retrieved her handgun before going into the kitchen to investigate the noises she heard, and if she knew how to use the gun, she could lawfully have shot the defendant as soon as she saw him in her kitchen. See Penal Code section 197 regarding justifiable homicide in defense of habitation.

Finally, the Law Enforcement Legal Reporter (LELR) has summarized several other cases affirming convictions for kidnapping for the purposes of robbery or kidnapping for the purposes of rape. These include:

People v. Dominguez (2006) 39 Cal.4th 1141 – Movement of a victim from an area open to public view to a secluded area is kidnapping for rape, robbery, etc., even if distance moved is only a matter of feet. November 2006 LELR; **People v. Vines** (2011) 51 Cal.4th 830 – Moving store employees from front of store into a downstairs freezer is kidnapping for robbery. September 2011 LELR; **People v. Arias** (2011) 193 Cal.App.4th 1428 – Moving victim 15 feet from apartment hallway into his apartment at gunpoint is simple kidnapping. Nov 2011 LELR; **People v. Medina** (2007) 41 Cal.4th 685 – Failed effort to carjack a van with five occupants is five counts of attempted kidnapping. November 2007 LELR; **People v. Corcoran** (2006) 143 Cal.App.4th 272 – Ten foot movement of victims into back room which increased their risk of harm is kidnapping for the purposes of robbery. April 2007 LELR; **People v. Aguilar** (2004) 120 Cal.App.4th 1044 – Moving a victim 133 feet from a lighted sidewalk to a dark area in order to rape her is kidnapping for rape. The movement increases the risk of harm to the victim. May 2005 LELR; and **People v. Shadden** (2001) 93 Cal.App.4th 164 – Moving a victim nine feet into a back room in order to rape her is kidnapping for rape. May 2002 LELR.

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OCTOBER 2012 BONUS FEATURE

SURVIVING CROSS-EXAMINATION

This Bonus Feature was excerpted from the book **"Courtroom Survival – The Officer's Guide to Better Testimony**," by Devallis Rutledge, Special Counsel to the Los Angeles County District Attorney. It explains how a defense attorney can make it appear that an officer witness is lying when, in fact, the officer is being completely truthful – and it explains how an officer can keep this from happening.

This excerpt is taken from the chapter, "Handling Cross Examination – Living With Your Report." It is as follows:

LIVING WITH YOUR REPORT

Defense attorneys like to be able to take something significant from your testimony, make you admit that it wasn't mentioned in your report, and then suggest to you that since you wrote the report while everything was fresher in your memory than it is now, you must be mistaken in your testimony. I've seen cop after cop *help* the defense attorney pull this stunt by allowing the attorney to put words in their mouth, like this:

Q: *Now, Officer, you wrote a report about this arrest, didn't you?*
A: *Yes, sir.*

Q: *And wasn't the purpose of that report to record all the important information about the case?*
A: *Yes, I guess so.*

Q: *I take it, Officer, that these events were clearer in your mind when you wrote the report than they are now, some six months later, right?*
A: *That's right.*

Q: *Did you deliberately leave out any significant details when you wrote this report?*
A: *No, sir.*

Q: *Don't you think it's significant to know which one of these men hit the other one first?*
A: *Yes.*

Q: *And it's your testimony today that you saw Sharp hit Peters first, is that right?*
A: *That's right.*

Q: *Now, Officer, did you put that in our report?*
A: *No, I guess I didn't.*

Q: *Would you care to explain to the jury, Officer, whether you left that out of your report because you didn't consider it significant at the time, or whether it's something you've just now recalled, six months later?*

There's no good way to get out of this, once you've gotten yourself into it. The solution is to refuse to let the defense attorney sell you on some of those mistaken premises – don't let him make up your answers for you.

Q: *Now, Officer, you wrote a report about this arrest, didn't you?*
A: *Yes, sir.*

Q: *And wasn't the purpose of that report to record all the important information about the case?*
A: *Not exactly. It's hardly ever possible to record all the information, so my report is usually more like a summary than a complete account of every single thing.*

Q: *But you do try to include in your report all the important details, don't you?*
A: *If I can tell at the time which details are going to prove to be important, yes sir. I can't always foresee what will turn out to be important in every case.*

Q: *I take it, Officer, that these events were clearer in your mind when you wrote the report than they are now, some six months later, right?*
A: *Some of them were, naturally, but some things are just as clear in my mind now as they ever were.*

Q: *Did you deliberately leave out any significant details when you wrote the report?*
A: *Not deliberately, but necessarily. Since I can't possibly put down everything, or anticipate what others will consider to be "significant," I do my best to give an accurate summary of what happened.*

Q: *Don't you think it's significant to know which one of these men hit the other one first?*
A: *Yes.*

Q: *And it is your testimony today that you saw Sharp hit Peters first, it that right?*
A: *That's right.*

Q: *Now, Officer, did you put that in your report?*
A: *No, I didn't.*

Q: *Would you care to explain to the jury, Officer, whether you left that out of your report because you didn't consider it significant at the time, or whether it's something you've just now recalled?*
A: *I'd be glad to explain it. I've been on the witness stand testifying about this for an hour and twenty minutes. I wrote my report in fifteen minutes. If I could afford to spend as much time writing each report as I spend testifying, I suppose I could include as many details, but I can't do that, or I wouldn't get any police work done. So I try to make every report a fair and accurate summary, and in doing that, I realize there are going to be times when something will be left out that may turn out later to be significant. Usually, if it's that significant, it will stand out in my memory, the way it does now that I saw Sharp hit Peters first.*

The above example covers just one area of cross-examination. It gives a suggested approach to responding to a defense attorney's questions, but it need not be memorized or repeated verbatim. You can use words and language that are natural to you but carry the same meaning.